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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1990

THE ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT; LEIGH PEGUES, Director of the Alabama Department of Environmental Management; and GUY HUNT, Governor of Alabama;

Petitioners,

v.

NATIONAL SOLID WASTE MANAGEMENT ASSOCIATION; and CHEMICAL WASTE MANAGEMENT, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

A. This Case Presents Important Legal Questions Warranting Review.

This case presents substantial questions of federal constitutional law. Whether hazardous waste is an article of commerce entitled to full constitutional protection under the Commerce Clause and whether a state under its historic police power can regulate hazardous waste are timely and important *national* questions. The answers to these questions are important to the Congress, the States, and the lower courts, who all need guidance for the effective administration of hazardous waste management programs.

Far from being a "settled . . . area of law," as contended by respondents (Respondents' Brief in Opposition, at 8), there is an emerging split of authority in the circuits. One line of cases follows the principles enunciated in the 1978 decision in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), viz., the Eleventh Circuit here; while another line follows the rationale of the more recent 1986 decision in *Maine v. Taylor*, 477 U.S. 131 (1986), viz., the Sixth Circuit in *Bill Kettlewell Excavating, Inc. v. Michigan Dep't of National Resources*, 1991 WL 65771 (6th Cir. May 1, 1991).

One commentator has acknowledged that *Maine v. Taylor* altered the standard of review of what may appear to be a facially discriminatory statute in environmental cases:

> Also under *Maine* a new interpretation of Commerce Clause principles was offered, accepted and transformed into law. . . .
>
> *The decision in Maine has altered the standard of strict scrutiny under which discriminatory statutes are evaluated.* Substantial uncertainties surrounding the effects of a particular environmental statute now shift the burden of proof back onto the challenger of a facially or de facto discriminatory statute. *The strict scrutiny presumption of invalidity has been shifted and discriminatory statutes are no longer treated any differently*

> *under Commerce Clause scrutiny than statutes that regulate evenhandedly.*

Note, *Maine v. Taylor: Natural Resources Statutes Against the Commerce Clause or When is a Hughes not a Hughes But a Pike?*, 29 Natural Resources Journal 291, 301-02 (Winter 1989) (emphasis added).

In *Bill Kettlewell Excavating, Inc. v. Michigan Dep't of Natural Resources*, the Sixth Circuit considered a Michigan statute that authorized counties to adopt a waste management plan. Under such a plan each county was authorized to prohibit the disposal of out-of-county waste in the county. 1991 WL 65771 (6th Cir. May 1, 1991). In other words, a county could restrict the disposal of waste solely to waste generated within that county. Under the statute, a private plaintiff landfill operator was completely prohibited from landfilling out-of-state waste and was limited to landfilling only waste generated in the county where the facility was located. The Sixth Circuit followed the approach in *Maine v. Taylor* rather than striking down the statute under *City of Philadelphia*. Therefore, despite respondents' assertion to the contrary, there is a split of authority in the decisions emerging after the 1986 decision in *Maine v. Taylor*.[1]

The petition should be granted because the case involves important issues of federal constitutional law and there is an emerging split of authority in the circuits on these important questions.

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[1]Respondents argue that there is no conflict among the lower court decisions and cite *inter alia Illinois v. General Electric Co.*, 683 F.2d 206 (7th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983); *Washington State Building & Construction Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983); and *Hardage v. Atkins*, 582 F.2d 1264 (10th Cir. 1978). These cases were decided before *Maine v. Taylor*. Respondents attempt to distinguish *Kettlewell* on the basis it did not expressly exclude out-of-state waste, but only waste from another county. However, if out-of-county waste is excluded, then *a fortiori* out-of-state waste is excluded. In fact, the exclusion of interstate waste is exactly what was litigated in *Kettlewell*, with the result that the waste disposal company was prohibited from importing and landfilling interstate waste.

B. Hazardous Waste Landfilling Poses a Genuine Danger to Public Health and the Environment.

Respondents incorrectly argue that "[w]hen such waste is properly managed pursuant to the applicable federal and state regulations, any health hazard is minimal." Respondents' Brief, at 2-3. First, just because the landfilling of hazardous waste at Emelle, Alabama, may be done in accordance with current federal regulations, does not mean there is no danger. The fact that the "unsinkable" Titanic was built in accordance with then current ship-building standards did not avoid a terrible maritime disaster.

Second, the record is replete with evidence that landfilling of hazardous waste has both known and unknown dangers. The District Court herein found that the risks of hazardous waste are indeed serious. See Petition, at 5-6. Further, respondents cite the case of *Chemical Waste Management, Inc. v. Alabama Dep't of Revenue,* CV-90-1098 (Ala. Cir. Ct. Feb. 28, 1991), appeal and cross-appeal pending, No. 190-1043 (Ala. Sup. Ct.). That state court case also involved the disposal of hazardous waste at the same Emelle hazardous waste landfill. Following a four day trial, the state judge found with respect to Emelle that: "The increase in tonnage has resulted in a significant increase in problems with regard to regulating and supervising the disposal of hazardous waste." *Chemical Waste Management, Inc. v. Alabama Dep't of Revenue,* CV-90-1098, Mem. Opinion, at 7.

That court further found that: (1) hazardous waste landfilled at Emelle includes "substances that are inherently dangerous to human health and safety and to the environment" and consisted of "ignitable, corrosive, toxic and reactive wastes which contain poisonous and cancer causing chemicals and which can cause birth defects, genetic damage, blindness, crippling and death." *Id.* at 10; (2) landfilling of the wastes produces leachate, a poisonous liquid, *Id.* at 11; (3) that it is inevitable that leachate will leak from closed trenches and spread into the underlying chalk formations; and, in fact, that

"it appears that leakage has already occurred with respect to at least some of the closed trenches." *Id.*; (4) that preventing leakage of leachate is beyond present technology, *Id.* at 12; (5) that monitoring wells have been installed at Emelle to attempt to monitor the spread of leachate, and "Periodic checks of those monitoring wells will be required *forever.*" *Id.* at 14 (emphasis added); (6) because the monitoring wells cannot monitor all locations, there is uncertainty whether contamination will be detected by the monitors, *Id.*; (7) that in 1989, 40,000 truckloads of wastes were transported over Alabama highways to Emelle and 34,000 to 36,000 were from out-of-state, *Id.*; and (8) that "Some of the trucks destined for Emelle have been involved in accidents causing hazardous waste to be spilled or released into the environment; several incidents of releases of hazardous wastes and noxious fumes have already occurred at the facility; and these risks are increased by the increasing volumes." *Id.* at 15.

These court decisions pertaining specifically to the Emelle facility are not the only authorities for the inherent dangers of commercial hazardous wastes landfilling. In a recent report to Congress, the United States General Accounting Office studied the ongoing dangers of hazardous waste disposal. *See* GAO/RCED-90-64, "HAZARDOUS WASTE, Funding of Postclosure Liabilities Remains Uncertain" (June 1990). The report summarizes the real dangers of land disposal facilities such as Emelle as follows:

> As evidenced by the events at Love Canal, Times Beach, and thousands of other sites contaminated by hazardous wastes, ***land disposal of these wastes presents a significant threat to human health and the environment.*** Hazardous waste disposal can contaminate the land as well as ground and surface waters. Once contaminated, cleanup of a hazardous waste site can cost millions, take many years to complete, and in some cases it may not be possible to remove all contamination. Moreover, many contaminants are

> toxic, may lead to cancer, or have other adverse human health effects.

Id. at 8 (emphasis added).

The report concludes "for the long term — beyond 30 years — there are questions about the effectiveness of EPA's current requirements . . . EPA is concerned about the effectiveness of its standards for the long term prevention of waste migration and the potential for postclosure liabilities." *Id.* at 15.[2]

Respondents imply that landfilling of hazardous waste poses little or no danger because the waste is pretreated to reduce its toxicity before burial. Respondents' Brief, at 2-3. GAO observed with respect to pretreatment, "[A]lthough some wastes degrade or can be made less hazardous through treatment, *some substances remain hazardous forever.*" *Id.* (emphasis added). GAO found "the magnitude of post-closure liabilities that could be incurred *simply cannot be measured at this time.*" *Id.* (emphasis added).

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[2]The report continues:

> Leakage that does occur after closure could result in significant liabilities such as corrective action costs and off-site damage claims. However, because of a lack of experience-based information, insufficient data exist on the extent and timing of potential leakage as well as the actions required to correct such leakage. Consequently, the magnitude of post-closure liabilities that could be incurred simply cannot be measured at this time.
>
> EPA is concerned about the effectiveness of its standards for the long-term prevention of waste migration and the potential for postclosure liabilities. Both GAO and EPA's Science Advisory Board have recommended the development of a strategy — describing activities and time frames for their completion — to address such concerns. However, because post-closure at currently operating hazardous waste disposal facilities is not viewed as a current environmental problem EPA has made this issue a lower priority in the RCRA program and has not developed the necessary strategy.

Id. at 15.

The consequences of hazardous waste landfilling are still imperfectly understood. EPA's own Science Advisory Board acknowledges this uncertainty: "[T]he Board determined that it is difficult to predict that improved land disposal will be protective of human health and the environment for the long-term." *Id.* at 24. Moreover, EPA's Science Board recognizes that the current EPA regulations are far from sacrosanct: "The report further concluded that there is an absence of a waste management strategy . . . necessary to develop the scientific and technical knowledge for developing land disposal guidance and regulations." *Id.* "According to EPA officials, a comprehensive strategy for addressing long-term postclosure concerns at permitted hazardous waste facilities has not been developed." *Id.*

Accordingly, respondents' argument that hazardous waste is not dangerous because it is landfilled in accordance with current EPA regulations provides little solace, particularly given that EPA itself is concerned about "the effectiveness of its standards." *Id.* at 15. As GAO notes, "The [EPA] report concluded that there is a need to evaluate and understand the long-term performance of what are now considered environmentally sound land disposal practices to ensure that these practices are environmentally sound for many decades." *Id.* at 24.

Respondents incorrectly argue that the *City of Philadelphia* holding of regular solid waste to be an article of commerce "applies with equal force to hazardous waste." Respondents' Brief, at 9. As shown above, the landfilling of hazardous waste is distinct because of its real dangers and the uncertainties surrounding the short and long term risks. Thus, ChemWaste is incorrect in its assertion that the issues have been decided and further inquiry is unwarranted.

C. The Holley Bill is Constitutional Under *Maine v. Taylor*.

The decision in *Maine v. Taylor* makes a distinction between state measures which discriminate arbitrarily against out-of-state commerce and attempt to place in-state interests in a position of commercial advantage, i.e., "simple economic protectionism," and state measures which seek to protect public health, safety, or the environment. The 1986 *Maine v. Taylor* decision was based upon the historic police power of states to protect public safety and health.[5] "This distinction between the power of the State to shelter its people from menaces to their health and safety . . . , even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law." *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525,533 (1949). Respondents can cite to no decision of this Court which has struck a state restriction on the importation into the state of out-of-state items for the actual (as opposed to claimed) purpose of protecting the health and safety of the state's citizens or the environment.

Even in the face of the known and unknown dangers of landfilling large volumes of hazardous waste (and the fact that current land disposal consequences "simply cannot be measured at this time"), Alabama has chosen not to close its borders to hazardous waste, as was done by St. Clair County in Michigan. *See Kettlewell*, 1991 WL 65771 (6th Cir. May 1, 1991). Instead, reasonable legislation was adopted allowing the nation to enjoy the benefits of the Alabama facility, while motivating some states to exercise responsibility to the degree they

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[5]It also follows in the historic tradition of the "quarantine cases." *See Bowman v. Chicago & Northwestern R. Co.*, 125 U.S. 465 (1888); *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935); *Sligh v. Kirkwood*, 237 U.S. 52 (1915); *Asbell v. Kansas*, 209 U.S. 251 (1908); *Railroad Co. v.. Husen*, 95 U.S. 465 (1878).

can by either siting facilities *or* making agreements with Alabama.[4]

It is not unreasonable for Alabama to assert its police powers and to implement its capacity assurance program under SARA to require that states shipping hazardous waste to Alabama for permanent burial should be required to **either** site a treatment or disposal facility **or** enter into an agreement with Alabama. A real interstate partnership can thereby by achieved, with the continued availability of Emelle, but with a reduction of interstate waste by increased disposal in the generating states.

The District Court found that Alabama in enacting the Holley Bill was not hoarding its natural resources, as was New Jersey in *City of Philadelphia*. *See* Petition, App. C, at A-53-54. New Jersey tried to close its landfills to out-of-state waste to preserve capacity for large volumes of domestic waste. Here, the level of in-state hazardous waste landfilled at Emelle is minimal compared to that of out-of-state waste. This case is not economic protectionism, "simple" or otherwise, nor is it a case of hoarding natural resources. Rather, the economic interests sought to be protected in this case are those of ChemWaste, a private company, with a monopoly to import hazardous waste to Emelle, which it admits has disposal capacity for another 100 years.[5]

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[4]Respondents argue that the Holley Bill contains a reciprocity provision similar to other statutes invalidated by the Court. In support of this argument respondents cite *New Energy Co. v. Limbach*, 486 U.S. 269 (1988); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982); and *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976). Those cases involved reciprocity provisions where equal treatment of out-of-state products or interests was contingent upon reciprocal treatment of product or interests from the granting state. The Holley Bill does **not** contain that type of reciprocity provision. Other states are **not** required to accept Alabama generated hazardous waste in exchange for acceptance of their hazardous waste.

[5]ChemWaste "estimates there is capacity at Emelle for another 100 years of operation." *ChemWaste*, CV 90-1098, Mem. Op., at 9.

The *Maine v. Taylor* approach was followed by the District Court in this case, as it was by both the District Court and the Sixth Circuit in *Kettlewell*. The Eleventh Circuit erred by mechanically following *City of Philadelphia*, as did the First Circuit in *Maine v. Taylor*. The petition in this case lists the factors that distinguish this case from *City of Philadelphia*. *See* Petition, at 16-17. Respondents did not address those distinctions.

The Court of Appeals here applied a superficial analysis of the Commerce Clause and never got beyond the initial consideration of what may appear to be a facially discriminatory statute. That was the same analysis employed by the First Circuit in *Maine v. Taylor*[6] and rejected by this Court. However, the determinative issues in this case are not whether the act facially discriminates, but whether Alabama through the Holley Bill may conditionally exclude out-of-state wastes to protect public health, safety and the environment. Are the principles of *Maine v. Taylor* to be followed, rather than those earlier announced in *City of Philadelphia*?[7]

CONCLUSION

The legal questions presented in this case involve important issues of federal constitutional law. These questions are worthy of the Court's review, not only because of the emerging con-

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[6] *United States v. Taylor*, 752 F.2d 757 (1st Cir. 1985).

[7] As one commentator recently observed: "The quarantine analogy that [Chief Justice] Rehnquist supports in his *Philadelphia* dissent may have greater force today in light of the more complete data about hazardous waste production and the contamination of the environment that would be available to the Court." Note, *Hazardous Waste in Interstate Commerce: Minimizing the Problem After City of Philadelphia v. New Jersey*, 24 Val. L. Rev. 76, 101 (1989).

flict in lower court decisions, but because commercial hazardous waste landfilling is a significant national problem. It is a problem today, and if not properly managed, will be a greater problem tomorrow. This Court's review is necessary if national and state decisionmakers are to have clear guidelines to follow in setting local hazardous waste management policy. The petition should be granted and the Holley Bill upheld.

June 3, 1991

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